

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO
34 UNITED STATES OF AMERICA,
56 Plaintiff,
78 v.
910 CRIMINAL:12-132 (DRD)
1112 [45] FERNANDO ALMODOVAR-TORRES,
1314 Defendant.
1516 MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
17 RE: RULE 11 PROCEEDINGS (PLEA OF GUILTY)18 **I. Procedural Background**

19 On February 28, 2012, a grand jury returned an indictment against [45] Fernando Almodovar-
20 Torres (hereinafter referred to as "defendant") and other individuals. (Docket No. 3.) The defendant
21 has agreed to plead guilty to count one of the indictment. Count one charges that beginning in or about
22 December, 2006, and continuing up to and until the return of the indictment, in the Municipality of
23 Ponce, District of Puerto Rico and within the jurisdiction of this court, Fernando Almodovar-Torres,
24 did knowingly and intentionally, combine, conspire, and agree with other persons known and unknown
25 to the grand jury, to commit an offense against the United States, that is, to knowingly and intentionally
26 possess with intent to distribute and to distribute controlled substances, to wit: two hundred eighty (280)
27 grams or more of a mixture or substance containing cocaine base (commonly known as "crack"), a
28 Schedule II Narcotic Drug Controlled Substance; one (1) kilogram or more of a mixture or substance
containing a detectable amount of heroin, a Schedule I, Narcotic Drug Controlled Substance; five (5)
kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II,
Narcotic Drug Controlled Substance; one hundred (100) kilograms or more of a mixture or substance
containing a detectable amount of marijuana, a Schedule I Controlled Substance; a mixture or substance
containing detectable amounts of Oxycodone (commonly known as Percocet), a Schedule II Controlled

1 Substance; and a mixture or substance containing a detectable amounts of Alprazolam (commonly
2 known as Xanax), a Schedule IV Controlled Substance, all within the real properties comprising
3 housing facilities owned by a public housing authority, that is, the Aristides Chavier Public Housing
4 Project, as prohibited by Title 21, United States Code, Sections 841(a)(1) and 860, all in violation of
5 Title 21, United States Code, Section 846.

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7 **II. Consent to Proceed Before a Magistrate Judge**

8 On November 30, 2012, while assisted by counsel, the defendant, by consent, appeared before
9 the undersigned in order to change his previous not guilty plea to a plea of guilty as to count one of the
10 indictment. In open court the defendant was questioned as to the purpose of the hearing being held and
11 was advised of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries were to be
12 conducted under oath and that it was expected that his answers would be truthful; (c) the potential
13 consequences of lying under oath (such as a perjury charge); and (d) his right to have the change of plea
14 proceedings presided by a district judge instead of a magistrate judge. The defendant was also
15 explained the differences between the appointment and functions of the two. The defendant consented
16 to proceed before the undersigned magistrate judge.

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18 **III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure**

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20 **A. Rule 11(c)(1) Requirements**

21 Rule 11 of the Federal Rules of Criminal Procedure governs the acceptance of
22 guilty pleas to federal criminal violations. Pursuant to Rule 11, in order for a plea of
23 guilty to constitute a valid waiver of the defendant's right to trial, guilty pleas must be
24 knowing and voluntary: "Rule 11 was intended to ensure that a defendant who pleads
guilty does so with an 'understanding of the nature of the charge and consequences of
his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4 (1st Cir. 1995) (quoting
McCarthy v. United States, 394 U.S. 459, 467 (1969)). [There are three core concerns
in these proceedings]: 1) absence of coercion; 2) understanding of the charges; and 3)
knowledge of the consequences of the guilty plea. United States v. Cotal-Crespo, 47
F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1st Cir. 1991)).

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26 United States v. Hernández-Wilson, 186 F.3d 1, 5 (1st Cir. 1999).

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28 **B. Admonishment of Constitutional Rights**

To assure defendant's understanding and awareness of his rights, defendant was advised of his
right:

2 1. To remain silent at trial and be presumed innocent, since it is the government who has the
3 burden of proving his guilt beyond a reasonable doubt.

4 2. To testify or not to testify at trial, and that no adverse inference could be made in relation
5 to his decision not to testify.

6 3. To a speedy trial before a district judge and a jury, at which he would be entitled to see and
7 cross examine the government witnesses, present evidence on his behalf, and challenge the
8 government's evidence.

9 4. To have a unanimous verdict rendered by a jury of twelve persons which would have to be
10 convinced of defendant's guilt beyond a reasonable doubt by means of admissible evidence.

11 5. To use the subpoena power of the court to compel the attendance of witnesses.

12 Upon listening to the defendant's responses, observing his demeanor and his speaking with his
13 attorney, that to the best of counsel's belief defendant had fully understood his rights, it is determined
14 that defendant is aware of his constitutional rights.

15 **C. Consequences of Pleading Guilty**

16 Upon advising defendant of his constitutional rights, he was further advised of the consequences
17 of pleading guilty. Specifically, defendant was advised that by pleading guilty and upon having his
18 guilty plea accepted by the court, he will be giving up the above rights and will be convicted solely on
19 his statement that he is guilty.

20 In response to further questioning, defendant was explained and he understood that if convicted
21 on count one as charged he will face not more than twice the following penalties: a term of
22 imprisonment of at least ten (10) years but not more than life, a fine not to exceed \$10,000,000, and a
23 term of supervised release of at least five (5) years. However, if the court accepts the defendant's guilty
24 plea and if the court accepts the amount of narcotics stipulated by the parties in the plea agreement, that
25 is at least two (2) kilograms but less than three point five (3.5) kilograms of cocaine, the penalty for the
26 offense shall be not more than twice the following: a term of imprisonment of at least five (5) years but
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2 not more than forty (40) years, a fine not to exceed \$5,000,000, and a term of supervised release of at
3 least four (4) years.

4 The defendant was explained what the supervised release term means and was also made aware
5 that the court must impose a mandatory penalty assessment of one hundred dollars (\$100) per offense
6 pursuant Title 18, United States Code, Section 3013(a).

7 The defendant was advised that the ultimate sentence was a matter solely for the court to decide
8 in its discretion and that, even if the maximum imprisonment term and fine were to be imposed upon
9 him, he later could not withdraw his guilty plea for that reason alone. Furthermore, the defendant was
10 admonished of the fact that by pleading guilty he would not be allowed later on to withdraw his plea
11 because he eventually might disagree with the sentence imposed, and that if he violates the conditions
12 of supervised release, that privilege could be revoked and he could be required to serve an additional
13 term of imprisonment. He was also explained that parole has been abolished. The defendant understood
14 this.

15 **D. Plea Agreement¹**

16 The parties have entered into a written plea agreement that, upon being signed by the
17 government, defense attorney and defendant, was filed and made part of the record. Defendant was
18 clearly warned and recognized having understood that:

- 19 1. The plea agreement is not binding upon the sentencing court.
- 20 2. The plea agreement is an agreement between the defendant, defense counsel and the attorney
21 for the government which is presented as a recommendation to the court in regards to the applicable
22 sentencing adjustments and guidelines, which are advisory.
- 23 3. The agreement provides a sentencing recommendation and/or anticipated sentencing
24 guideline computation, that can be either accepted or rejected by the sentencing court.

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“Plea agreement” refers to the agreement and its supplement.

4. In spite of the plea agreement and any sentencing recommendation contained therein, the sentencing court retains full discretion to reject such plea agreement and impose any sentence up to the maximum possible penalty prescribed by statute.

5 Defendant acknowledged having understood these explanations.

6 **E. Government's Evidence (Basis in Fact)**

7 The government presented a proffer of its evidence consistent with the version of facts of the plea
8 agreement with which the defendant concurred. Accordingly, it is determined that there is a basis in fact
9 and evidence to establish all the elements of the offense charged.

10 **F. Voluntariness**

11 The defendant accepted that no threats had been made to induce him to plead guilty and that he
12 did not feel pressured to plead guilty.

13 **G. Waiver of Appeal**

14 The defendant was explained, and he understood, that if the court accepts the plea agreement and
15 sentences him according to its terms and conditions, he will be surrendering his right to appeal the
16 sentence and judgment in this case.

17 **IV. Conclusion**

18 The defendant, by consent, has appeared before me pursuant to Rule 11, Federal Rules of
19 Criminal Procedure, and has entered a plea of guilty as to count one of the indictment. After cautioning
20 and examining the defendant under oath and in open court, concerning each of the subject matters
21 mentioned in Rule 11, as described in the preceding sections, I find that defendant is competent to enter
22 this guilty plea, is aware of the nature of the offense charged and the maximum statutory penalties that
23 the same carries, understands that the charge is supported by the government's evidence, has admitted
24 to every element of the offense charged, and has done so in an intelligent and voluntary manner with full
25 knowledge of the consequences of his guilty plea. Therefore, I recommend that the court accept the
26 guilty plea of the defendant and that the defendant be adjudged guilty as to count one of the indictment.

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B). Any objections to the same must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. Fed. R. Civ. P. 72(b). Failure to timely file specific objections to the report and recommendation is a waiver of the right to review by the district court. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

7 SO RECOMMENDED.

8 At San Juan, Puerto Rico, this 30th day of November, 2012.

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10 s/Marcos E. López
U.S. Magistrate Judge
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